Supreme Court, U.S.
FILED
00-519 SEP 29 2000

No. 00-___

In The

Supreme Court of the United States

SUPERINTENDENT OF CLINTON CORRECTIONAL FACILITY, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, AND ATTORNEY GENERAL OF NEW YORK,

Cross-Petitioners,

v.

MARTIN H. TANKLEFF,

Cross-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

MICHAEL J. MILLER*
STEVEN A. HOVANI
Of Counsel to
JAMES M. CATTERSON, JR.
District Attorney of Suffolk County
Criminal Courts Building
200 Center Drive
Riverhead, New York 11901
(631) 852-2500

Attorneys for Cross-Petitioners
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

7pp

QUESTION PRESENTED

The question presented in this Conditional-Cross-Petition involves the jurisdiction of the Circuit Court to have entertained Tankleff's appeal. It is:

> Whether the Circuit Court had jurisdiction to consider Tankleff's appeal when that Court erroneously decided that the provisions of the Anti-terrorism and Effective Death Penalty Act (AEDPA) did not govern issuance of the certificate of appealability. The Circuit Court's decision is directly at odds with this Court's decision in *Slack v. McDaniel*, ___ U.S. ___, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

LIST OF PARTIES

The parties to the proceeding below were:

The Superintendent of Clinton Correctional Facility, Cross-Petitioner;

The Commissioner, New York State Department of Correctional Services, Cross-Petitioner;

The Attorney General of the State of New York, Cross-Petitioner; and

Martin H. Tankleff, Cross-Respondent.

OPINION BELOW

On February 25, 1997 the District Judge issued a certificate granting Tankleff permission to appeal to the Second Circuit Court of Appeals. There was a disagreement whether the document was a certificate of probable cause or a certificate of appealability. This question was argued in the appeal and the Circuit Court decided that Tankleff required only a certificate of probable cause eve though the application for permission to appeal postdated the effective date of the AEDPA. *Tankleff v. Senkowski*, 135 F.2d 235, 241-42 (2d Cir. 1998). The Memorandum and Order granting the certificate of probable cause/appealability is found at J.A. 3787-3791 and is reprinted in the Appendix.

JURISDICTION

This Court has jurisdiction to consider this Conditional Cross-Appeal pursuant to 28 U.S.C. § 1254(1) and Rules 12 and 13 of the Rules of the Supreme Court of the United States.

Tankleff's Petition for a Writ of Certiorari was filed on August 28, 2000 and it was docketed on August 30, 2000. We received the Petition on August 29, 2000.

STATEMENT OF THE CASE

This is a Conditional Cross-Petition for a writ of certiorari. We respectfully refer the Court to No. 00-327,

Tankleff's Petition for a Writ of Certiorari for a full recitation of the nature of the case.

After the District Court denied the petition for a writ of habeas corpus, Tankleff requested that the District Court issue a certificate of probable cause. On February 28, 1997, the Court granted Tankleff permission to appeal. In that Memorandum and Order the District Court referred to a certificate of appealability but did not address any of the requirements for such a certificate (J.A. 3790).

On appeal we maintained that the Circuit Court lacked jurisdiction because Tankleff needed to obtain a certificate of appealability and the District Court's decision did not fulfill those requirements. Tankleff, in his Reply Brief, argued that the District Court plainly intended to certify all of the issues for further review.

The Circuit Court directly addressed this issue and held that although the request for a certificate of appealability came after the effective date of the Antiterrorism and Effective Death Penalty Act, this case only required a certificate of probable cause. The Circuit Court then decided that the certificate was sustainable as a certificate of probable cause. The Circuit Court, therefore, did not determine if the certificate was sufficiently specific to satisfy the new statutory requirements.

ARGUMENT

The Circuit Court's decision directly contradicts the holding of *Slack v. McDaniel*, ___ U.S. ___, 120 S.Ct. 1595,

146 L.Ed.2d 542 (2000). In *Slack*, the Court held that revised 28 U.S.C. § 2253 governed a request to appeal from the denial of a petition for a writ of habeas corpus when the petition was filed before the effective date of the AEDPA but the request for leave to appeal came after the effective date of the AEDPA. The procedural posture in *Slack* is identical to the procedural posture of this case.

In the Circuit Court we argued that Tankleff could not establish that he was denied any constitutional right. According to the provisions of 28 U.S.C. § 2253(c) an unsuccessful habeas corpus petitioner must obtain a certificate of appealability in order to further pursue collateral post-judgment relief. The application for a certificate of appealability is first made in the District Court and it can be renewed in the Circuit Court if the first decision is adverse to the applicant. 28 U.S.C. § 2253(c)(1). In order to obtain a certificate of appealability the applicant must make a substantial showing that he was denied a constitutional right. 28 U.S.C. § 2253(c)(2). The substantial showing required by § 2253(c)(2) is the codification of the standard established in *Barefoot v. Estelle*, 463 U.S. 880 (1983), and is the same standard which was used to evaluate the old certificate of probable cause. *Reyes v. Keane*, 90 F.3d 676 (2nd Cir. 1996).

Under the old certificate of probable cause framework an appellant needed to make a substantial showing that the overall petition indicated the denial of a constitutional right. A certificate of probable cause could, however, be limited to certain issues, and the Circuit Court usually respected any limitation established by the District Court. *Vicaretti v. Henderson*, 645 F.2d 100 (2d Cir. 1980), *cert. denied*, 454 U.S. 868 (1981); *Barber v. Scully*, 731

F.2d 1073, 1075 (2d Cir. 1984). A certificate of appealability differs from a certificate of probable cause in this regard. Thus, a certificate of appealability *must* indicate which specific issue or issues satisfy the substantial showing requirement. 28 U.S.C. § 2253(c)(3); *see Federal Habeas Corpus Practice and Procedure*, Liebman and Hertz, 2d Ed., 1996 Cumulative Supplement, p. 285.

Although the standard for obtaining further review remains the same, it must be applied within the context of the petitioner's burden of persuasion. Now, according to 28 U.S.C. § 2254(d)(1) and (2), a habeas corpus petitioner cannot prevail unless he demonstrates that the State court decision on the issue presented was based on an unreasonable determination of the facts or that it relies on an unreasonable application of Federal law. Thus, in order to make the substantial showing required to obtain a certificate of appealability, the petitioner must establish that the District Court incorrectly decided that the State court decisions were reasonable. Furthermore, because the provisions of 28 U.S.C. § 2253(c)(3) are mandatory, there is no jurisdiction for an appeal from the denial of a petition for a writ of habeas corpus unless the specific issues which meet the statutory requirement are delineated. Here, the certificate of appealability does not fulfill the statutory requirements.

The certificate of appealability issued in this case does not meet the mandatory requirements of 28 U.S.C. § 2253(c). Tankleff could not establish a substantial basis for further review of his habeas corpus petition and the Circuit Court was, therefore, without jurisdiction and the appeal should not have been heard.

This is a Conditional Cross-Petition and review is appropriate only if Tankleff's petition is granted. We request that Tankleff's petition be denied. If, however, his petition is granted, we request that the Conditional Cross-Petition be granted. If both petitions are granted, the Court should dismiss the appeal and deny the writ. The proceedings subsequent to granting the certificate of appealability establish that Tankleff was not denied any constitutional right. Further litigation is unwarranted.

CONCLUSION

THE CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED IF THE PETITION FOR A WRIT OF CERTIORARI IS GRANTED.

DATED: Riverhead, New York

September 29, 2000

Respectfully submitted,

MICHAEL J. MILLER*
STEVEN A. HOVANI
Of Counsel to
JAMES M. CATTERSON, JR.
District Attorney of Suffolk County
Criminal Courts Building
200 Center Drive
Riverhead, New York 11901
(631) 852-2500

Attorneys for Cross-Petitioners
**Counsel of Record*

APPENDIX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

_____X

MARTIN H. TANKLEFF,

Plaintiff,

-against-

D. A. Senkowski, et al.,

Defendants.

_____X

MEMORANDUM AND ORDER

96-CV-0507 (TCP)

PLATT, District Judge.

With the benefit of "Monday morning quarterbacking" and able lawyers associated with experienced, large law firms, it is not difficult for any criminal defendant in a "high profile" case to magnify the significance and "importance" of one or more "close calls" in pre-trial and trial proceedings and make respectable arguments as to their constitutional validity in a habeas corpus (post jury trial) proceeding which might find acceptability in arenas removed from reality but not otherwise.

Defendant did so here recently and this Court gave defendants pleas in depth, careful and thoughtful consideration notwithstanding the fact that the seven highly esteemed members of our State's Court of Appeals, three highly esteemed members of the our Appellate Division, Second Department and a very respected member of the Suffolk County Supreme Court had carefully reviewed, considered and denied defendant's motions.

As pointed out in our Memorandum and Order dated January 29, 1997, the factual findings of our State courts are "presumed to be correct."

The State Supreme Court Justice (Tisch, J.) not only was in the best position to evaluate the testimony and to determine the "custodial" question, but also, most importantly, was in the best position to hold that the defendant's statements to the police were voluntary, reliable and corroborated. These were not ordinary murders; they were beatings and stabbings to death of a mother (matricide) and father (patricide), who the police found on their arrival at the scene to be in the presence of their son (the defendant) who was soiled with blood.

Normal behavior on the part of the son would not follow the pattern that occurred here culminating in a full confession after *Miranda* warnings.

Appropriate professional behavior on the part of the police, on the other hand, would have followed the practice that occurred here. There was no leap to a premature conclusion, there was an opportunity given to a possible suspect away from the highly charged, stressful scene to offer whatever explanation he wished to give and there was a test made of his explanation which revealed to the son the futility of his position. Thereafter, the arrest was made, warnings were given and a voluntary confession was given by the son which was corroborated by the scene at the crime itself.

Moreover, there is nothing to show that (i) the failure to give a *Batson* hearing with respect to the peremptory challenges, (ii) the failure to furnish information allegedly required under *Brady v. Maryland*, 373 U.S. 83,

85 (1963), as to prior conduct of the person whose only accuser was the defendant prior to his voluntary confession or (iii) the prosecutor's comments about the failure to call a sister who might normally have been expected to be supportive of the defendant as one who would not kill their mother and father, would have affected the jury's verdict in this case. The only one of these three grounds that falls squarely within the "close call" category is whether the failure of the police to turn over to the defense the so-called Hell's Angels information that some ten years before the trial Jerry Steuerman (who defendant said was the killer in this case) had hired Hell's Angels to beat up labor union workers who were harming his business. Mr. Steuerman was called as a Government witness who did not implicate the defendant as the perpetrator but did testify he himself "would never do anything like that." *Arguably,* hiring the Angels to beat up people was "[something] like that" and, hence, impeachable material both as to Mr. Steuerman and the adequacy of Detective McCready's investigation but *equally arguably* the hiring of someone to commit violent acts (a cowardly act) was totally inconsistent (i.e. not a similar act) with the personal cold blooded killing of the defendant's parents.

On balance, it is difficult to say with any degree of certainty that this information would have affected the jury's verdict in this case with the confession by this sophisticated above average high school defendant and his abnormal behavior and responses to the police prior to his arrest. The State Court Judges whose findings "are presumed to be correct" said "no" and if there is any meaning to the presumption this Court should and does agree.

It should be quite clear from the foregoing that this Court feels that the three State Courts should be sustained and that there are, at best, arguments that there is a substantial basis for granting a certificate of appealability. Nonetheless, given the importance of the case and extent of the sentence which was virtually mandated by the verdict, defendant's motion for such a certificate is hereby, granted.

SO ORDERED.

/s/ _____
District Judge, U.S.D.C.

Dated: Uniondale, New York
February 28, 1997